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December 2, 2010

Via fax @ (512) 239-5533 and Hand Delivery

Mr. Les Trobman
TCEQ General Counsel MC-101
P.O. Box 13087
Austin, TX 78711-3087

Re: TCEQ Docket No. 2009-033-AIR, SOAH Docket No. 582-09-2005;
Application of Las Brisas Energy Center, LLC for State Air Quality
Permit Nos. 85013, HAP48, PAL41, and PSD-TX-1138

Dear Mr. Trobman:

This letter is being sent on behalf of Environmental Defense Fund ("EDF") in response to Applicant Las Brisas Energy Center, LLC's ("Applicant") letter of December 1, 2010 requesting an expedited schedule for exceptions and replies to the Proposal for Decision issued late yesterday by the Administrative Law Judges in the referenced matter. The Applicant's proposed schedule allows only seven days (and five working days) for exceptions and a mere two days for replies. The Texas Commission on Environmental Quality's ("Commission") rules generally provide for 20 days to file exceptions and 10 days thereafter for replies. See 30 TAC § 80.257(a).

Although the Applicant contends that it "is most disadvantaged" by this schedule, please be advised that there are a number of issues as to which EDF plans to file substantial exceptions. And more importantly, the ALJs' 52-page Proposal for Decision attaches, for the very first time in this case, proposed findings of fact and conclusions of law. There are 276 proposed findings of fact and 42 conclusions of law, which cover the entire range of issues in the case - not merely the issues that were remanded to SOAH by the Commission. Because this is the first time the ALJs have issued proposed findings of fact and conclusions of law, preparing exceptions and replies will require review of the entire record from both hearings, and likely will encompass issues in addition to those remanded to SOAH. Moreover, as the Commission is aware, this case involves a major new source of air pollutants in a heavily populated area, and has generated much interest and concern among residents of the Corpus Christi area. Under these circumstances, allowance of the usual time periods for exceptions and replies is both proper and necessary for the parties to adequately address the issues raised in the PFD and the ALJs' findings of fact and conclusions of law.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2010 DEC -2 PM 12:30
CHIEF CLERKS OFFICE

Finally, as noted in EDF's letter of December 1, 2010 to the ALJs (See Attachment A), no reason has been presented by the Applicant to expedite this matter other than the Applicant's desire to avoid potential greenhouse gas regulation that may or may not become effective in January 2011. Assisting the Applicant in attempting to avoid the possibility of future regulation is an invalid basis for shortening the period for the parties to file exceptions and replies to exceptions. And as the ALJs have previously noted, the remand and accompanying delay in this case were occasioned by the Applicant's own failure to meet its burden of proof in the original hearing. (See Attachment B, ALJs' Order No. 22 at p. 4). The Commission should reject the Applicant's invitation to radically curtail the parties' opportunities to respond to the PFD for the mere benefit of the Applicant.

Accordingly, EDF respectfully objects to the Applicant's request to expedite the time periods for exceptions and replies, and further submits that any shortening of the time frames set forth in 30 TAC § 80.257(a) would be inappropriate under the circumstances of this case.

Sincerely,



Thomas M. Weber
Attorney for EDF

TMW/jam
Attachments

cc: The Honorable Craig R. Bennett
The Honorable Tommy L. Broyles
All Parties on Attached Service List

STATE OFFICE OF ADMINISTRATIVE HEARINGS**WILLIAM P. CLEMENTS BUILDING****300 West Fifteenth Street****Austin, Texas 78701****Phone (512) 475-4993****Facsimile (512) 475-4994****SERVICE LIST**

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES
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December 1, 2010

Honorable Tommy L. Broyles
Honorable Craig R. Bennett
Administrative Law Judges
State Office of Administrative Hearings
300 West 14th Street
Austin, Texas 78701

Re: SOAH DOCKET NO. 582-09-2005; TCEQ DOCKET NO. 2009-0033-AER
Application of Las Brisas Energy Center, LLC for State Air Quality
Permit Nos. 85013, HAP48, PAL41 and PSD-TX-1139

2010 DEC - 2 PM 12:30
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Dear Judges Bennett and Broyles:

This letter is written in response to Applicant's letter to you of yesterday, November 30, 2010, wherein Applicant indicates its intention to request that the General Counsel of the Texas Commission on Environmental Quality ("TCEQ") shorten the period for filing exceptions and replies to exceptions. EDF opposes any such shortening of the schedule for filing exceptions and replies.

The Applicant proposes to shorten the period for filing exceptions from 20 days to possibly as little as 4 days (or only 2 business days), and the period for filing replies to exceptions from 10 days to 2 days. 30 TAC § 80.257(a). The purpose of Applicant's request is so that its application can be considered at TCEQ's December 14th Agenda Meeting—the TCEQ's last scheduled meeting of the year. The Applicant's extraordinarily desperate attempts to have this matter placed on the December 14th Agenda is a predicament of its own making. As you will recall, the parties participated in a nine-day contested case hearing on Las Brisas' Application back in November 2009. Following that hearing, the ALJs, and later the Commissioners, found that the Applicant had failed to meet its burden of proof on multiple grounds. At that point, Las Brisas' Application either should have been denied or remanded to staff with new notice issued as required by law under Tex. Health & Safety Code § 382.0291(d). Instead, however, the Commission gave the Applicant another "bite at the apple" by remanding to SOAH for a second hearing which was held in October 2010. As the ALJs are aware, the remanded hearing involved a number of hotly contested issues and

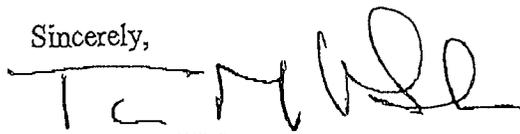
substantial post-hearing briefing by the parties. We do not yet know the results of that proceeding as the ALJs have not yet issued a Proposal for Decision ("PFD"). However, one thing we do know is that there is simply no valid basis for the General Counsel to shorten the subject time periods as requested by the Applicant.

First off, reducing the filing deadlines as proposed by Applicant would substantially impair EDF's and the other Protestants' due process rights. Given the importance of this case (the power plant would be located within 1/2 mile of nearby schools and churches located in downtown Corpus Christi), the technical and legal complexity of the issues, and the substantial record developed before SOAH, the parties must be afforded a full and adequate opportunity to address the PFD and the parties' exceptions to that PFD. Furthermore, constraining the parties' abilities to effectively respond to the PFD deprives the ALJs and Commission of the intended benefit of the parties' exceptions and replies in making the ultimate decision in this case.

More importantly, as Applicant has made clear in several prior pleadings, Applicant's sole basis for requesting an expedited schedule is so that it can avoid the possibility of having to demonstrate compliance with federal regulations regarding greenhouse gases (the so-called "tailoring rule") that may or may not become effective in January 2011. Assisting the Applicant in attempting to avoid the possibility of future regulation is not a valid basis for arbitrarily shortening the period for the parties to file exceptions and replies to exceptions. If Applicant wanted its permit issued this year, it should have met its burden of proof in the original proceeding and avoided remand. It did not do so. It is not the role of the TCEQ to expedite any applicant's permit application especially when doing so is at the expense of EDF's and the other parties' due process rights. The General Counsel should reject Applicant's invitation to engage in such naked favoritism.

The Applicant's proposal would in effect fundamentally and radically short-circuit the exceptions process for no reason other than to serve the Applicant's unilateral wish to be granted a permit before January 2011. Accordingly, EDF objects to any shortening of the time period for filing exceptions or replies to exceptions in a case of this magnitude and importance. Given the lack of any valid justification for the Applicant's proposed schedule, EDF respectfully requests that the ALJs likewise object to shortening the subject deadlines.

Sincerely,



Thomas M. Weber

TMW/jam

cc: Attached Service List (via facsimile or U.S. Mail)
Mr. Les Trobman, TCEQ General Counsel (via facsimile)
Mr. Larry Starfield, Deputy Regional Administrator, USEPA Region 6 (via facsimile)

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AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES
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SOAH DOCKET NO. 882-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

APPLICATION OF LAS BRISAS § BEFORE THE STATE OFFICE
ENERGY CENTER, LLC §
FOR STATE AIR QUALITY § OF
PERMIT; NOS. 85013, HAP48, PAL41, §
AND PSD-TX-1138. § ADMINISTRATIVE HEARINGS

ORDER NO. 22
DENYING MOTION TO RECONSIDER ORDER NO. 21

On September 3, 2010, Las Brisas Energy Center, LLC (Applicant) filed a motion asking the Administrative Law Judges (ALJs) to reconsider Order No. 21 in this case. Having reviewed the motion, the ALJs decline to set aside or otherwise modify Order No. 21 for the reasons set forth in this order.

A. Procedural History

As an initial matter, the ALJs note the following procedural history relevant to this current issue:

- 1. On September 1, 2010, the ALJs received the following email from Tom Weber, attorney for Protesting Party Environmental Defense Fund (EDF):

This email is to inform you and the other parties that EDF is sad to learn that EDF's testifying modeling expert, Dr. Roberto Gasparini, was severely injured in a car accident last evening when driving from Austin to Houston following being deposed in this case. Dr. Gasparini is currently in surgery. We have very little information at this time other than his injuries are severe and include at least two broken ankles, a broken knee and a collapsed lung.

- 2. Shortly thereafter, EDF filed a motion for continuance of the case. A response was received from Las Brisas and then a telephone conference was held that same day to take argument. This was the Wednesday before the hearing was to start the following week—which was why the ALJs acted to rapidly. Time did not allow for a more full deliberation, as the parties were all preparing for the hearing set to begin just days later.

SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

ORDER NO. 22

PAGE 2

3. During the telephone conference, EDF's counsel represented that Dr. Gasparini had been in surgery for hours that morning and they still did not know his condition. At the conclusion of the telephone conference, the ALJs ruled that a continuance would be granted based upon the "severe" injuries to Dr. Gasparini and the information learned during the telephone conference establishing him as protestants' key witness for some of the significant issues remanded to SOAH by the Commissioners. The ALJs were persuaded by the various Protestants' arguments that his attendance was necessary for Protestants to present their case at hearing, but that would not be possible in the near term given his injuries.
4. The ALJs issued Order No. 21, finding that good cause existed for EDF's motion and that EDF's due process rights for a reasonable opportunity to present its case at hearing would be infringed if the hearing were to continue as scheduled just a few days later. The ALJs denied Applicant's request to certify the question to the Commission because they concluded that the issue presented was procedural in nature, involved simply a fact issue, and did not involve a policy question for the Commission to decide.
5. The next day, Applicant filed a letter to the General Counsel of the Commission, but also asking the ALJs to reconsider their ruling. The ALJs construe Applicant's letter as a motion for reconsideration of Order No. 21.
6. On September 8, 2010, Applicant filed a Motion for Rehearing before the Commission, asking the Commission to reconsider its Order of Remand to SOAH and once again urging it to issue the Permit with the record created during the initial evidentiary hearing and other certain matters Applicant suggests the Commission may now consider.

B. Motion to Reconsider Order No. 21

As noted in Order No. 21, the ALJs found good cause for EDF's Motion noting that:

SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-ADR

ORDER NO. 22

PAGE 3

EDF would be significantly prejudiced without the services of Dr. Gasparini, both as a witness and as a resource for cross-examination of witnesses for Applicant and the ED. In cases such as this, the presence of expert witnesses may often be critical to the effective cross-examination of other expert witnesses. Thus, the issue is not simply a matter of taking Dr. Gasparini's testimony later. Rather, Dr. Gasparini's presence at the hearing—or the presence of another expert witness who could be given sufficient time to prepare for the hearing—is an essential part of the contested case process in hearings such as this.

The additional information provided by Applicant in its subsequent filings has not altered the ALJs' evaluation of the situation. First, the ALJs did not place any burden on Applicant regarding the continuance in this matter. As Order No. 21 states, the ALJs found good cause shown by EDF for its requested continuance and that EDF would be denied due process if it were forced to proceed. The mention of no harm alleged by Applicant was merely supportive of the order and was not the basis of the order. At no point did the ALJs place any burden on Applicant in regard to the continuance. Rather, it is common practice that once the moving party has met its burden of proof, if harm is shown by another party, the ALJs will attempt to craft a resolution that both satisfies the rights of the moving party while minimizing harm to other parties. This was unnecessary at the time Order No. 21 was issued as Applicant failed to mention any real or potential harm to it.

In its latest filings, Applicant has suggested that it will be harmed by the continuance because of the potential for the U.S. Environmental Protection Agency (EPA) to implement its Greenhouse Gas Tailoring Rule (Tailoring Rule) before a final order can be issued in this case, thus affecting the issuance of a permit in this matter. Applicant asserts the potential exists for EPA to impose its own federal implementation plan and require that greenhouse gases be considered for PSD permits in Texas. While understanding the predicament Applicant now finds itself in, the ALJs do not find a resolution that will comply with relevant law and due process rights so as to ensure that all parties are given a fair opportunity to address the substantive issues remanded by the Commission. Six weeks appears to be the minimum time necessary for EDF to either employ and obtain other adequate expert opinion for its case or to allow the potential for Dr. Gasparini to return.

SOAH DOCKET NO. 502-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

ORDER NO. 22

PAGE 4

Moreover, the ALJs note that Applicant finds itself in this predicament of its own making. As noted in the Proposal for Decision, Applicant failed to meet its burden of proof when given a two-week hearing to present its application—even though it had been made aware of many of the issues by the protestants months before the hearing (on, for example, secondary emissions and materials handling concerns). Applicant never addressed some of those deficiencies and, in regard to others, offered a last minute attempt to correct by presenting new modeling offered in rebuttal. But, this offer was met with the Executive Director's own notation that it must review all the modeling in PSD permitting processes and that it had not had any opportunity to review Applicant's new modeling. Based on this, the ED recommended the matter be remanded. During recent discussions, it was revealed that the ED's review of Applicant's modeling on remand and its issuance of its Second Modeling Audit was not completed until August 25, 2010, and involved extensive time for review.

Thus, Applicant finds itself in the present predicament because it failed to prove its Application met all applicable rules and regulation during the first hearing. Dr. Gasparini's serious injuries and potential regulatory changes that may effect the application are secondary to the reason why the permit is still pending. Regardless of how Applicant paints the facts, it is the protestants who have approached this debate with clean hands—as certainly no one would argue that they have hid behind the log in identifying most of their concerns about the Application or in causing their own expert to be seriously injured.

This raises another concern to the ALJs: Applicant's repeated misrepresentations when presenting arguments. The most recent example is Applicant's assertion that, during his deposition, Dr. Gasparini, "admitted he was not qualified as an expert." This is not true—at least for the portions of the deposition transcript attached in support of Applicant's motion and reviewed by the ALJs. Rather, Dr. Gasparini admitted he had not performed work for a PSD permit, but he never, in any form or fashion that the ALJs can discern from the deposition excerpts, indicated he was not qualified as an expert. It is a serious thing to assert that a witness "admits" something. While it may be appropriate for Applicant to argue that Dr. Gasparini does not qualify as an expert, there appears to be no basis for the statement that Dr. Gasparini admitted that he was not qualified as an expert in

SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AJR

ORDER NO. 22

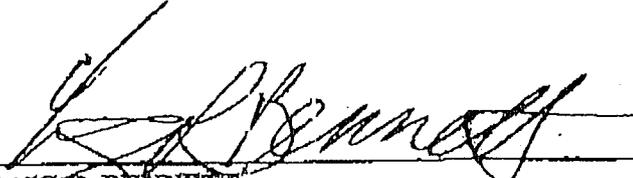
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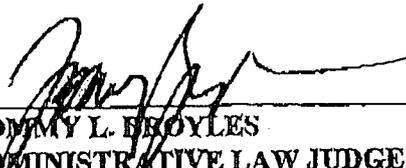
the area on which he offered testimony. In the future, the ALJs trust that Applicant's counsel will be more careful in making assertions about what the evidence actually indicates. To do anything less crosses the line from strong, but acceptable, advocacy to inappropriate misrepresentation of facts.

Considering all of the above, the ALJs do not find justification to curtail Protestants' ability to effectively participate in the hearing by limiting their access and preparation for an expert to anything less than the six weeks presently granted. Given the extent of evidence and information in this proceeding, six weeks appears to be the minimum time necessary to satisfy Protestants' due process rights to fairly participate in the contested case hearing.

Because the ALJs continue to believe that EDF would be denied fundamental due process if forced to go to hearing without the benefit of their expert witnesses, the ALJs do not find it appropriate to set aside Order No. 21 at this time.

SIGNED September 9, 2010.


CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
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STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGE
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PARTIES

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SOAH DOCKET NO. 582-09-2005

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DEC. 2. 2010 12:38PM

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SOAH DOCKET NO. 582-09-2005

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Date: December 2, 2010

Re: SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR; In re the Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013; HAP48, PAL41, and PSD-TX 1138.

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